HOECHEONG PRODUCTS COMPANY LIMITED

v.

CARGILL HONG KONG LIMITED

PRIVY COUNCIL
LORD JAUNCEY OF TULLICHETTLE, LORD ACKNER,
LORD OLIVER OF AYLMERTON, LORD MUSTILL & LORD WOOLF
[PRIVY COUNCIL APPEAL NO. 7 OF 1994]
2 FEBRUARY 1995

CONTRACT: *Short delivery of cotton seed expellers - Whether force majeure applied in the circumstances - Conditions to be complied with for the certificate to be used.*

PRACTICE & PROCEDURE*: Appellate Court deciding on facts never investigated at trial - Whether Court can seek to introduce new legal issues.*

The appellants (sellers) agreed to sell to the respondents (buyers) 10,000 tons of cotton seed expellers. The sellers did not deliver the whole contract quantity. The buyers claimed damages. The sellers relied on a "force majeure" clause in the contract to exempt them from liability. The ground asserted was that the contract called for shipment of goods originating in Henan province, and that there had been such a severe drought in Henan during the growing season that it was impossible for them to procure goods from the only permitted suppliers, CNNP. The buyers denied that the force majeure clause applied to the facts of the case or that the formalities which it prescribed had been complied with. It was also argued by the sellers that for the certificate to be valied it only need to be issued by China Council for the Promotion of International Trade (CCPIT).

On appeal, the Court of Appeal decided on facts that were never investigated at the trial.

Held:

[1] The principles which inhibit the parties from raising new points on appeal, particularly where the facts have not been investigated at the trial, are so well established. These principles apply equal where it is the Court, rather than the parties which seeks to introduce the new legal issue.

[2] The Court may wish to take the new matter into account, before doing so it should always ensure that the parties have an opportunity to deal with it, either by restoring the appeal for further oral argument, or at least by drawing attention to the materials which have come to light and inviting written submissions upon them. The present case required even more meticulous procedures, for what the Court introduced was not new materials on the existing issue but on entirely new questions of law and fact. The occasions when an appellate Court would find it proper even to contemplate such a course after the conclusion of the arguments must be rare, but it were ever to do so the first step must always be to have the matter thoroughly explored by adversarial means, as regards not simply the merits of the new question but also the propriety of entering upon it at all.

[3] From a practical point of view the document need certify only the occurrence of a force majeure event and since the wording of the clause does not point unequivocally the other way, the clause should be understood as requiring only that CCPIT should attest the

occurrence of the force majeure event. On this view the certificate actually tendered was in compliance with the clause, and all other requirements of the exception being fulfilled the sellers are not liable for the short delivery.

[Appeal allowed].

Cases referred to:
The Tasmania [1890] 15 App. Cas. 223 ***(cit)***
Connecticut Fire Insurance Company v. Kavanagh [1892] AC 473 ***(cit)***
Esso Petroleum Co. Ltd. v. Southport Corporation [1956] AC 218 ***(cit)***
P.J.Vander Zijden Wildhandel v. Tucker & Cross Ltd. [1975] 2 Lloyd's Rep. 240 ***(cit)***

Other sources referred to:
Benjamin's Sale of Goods, 4th Edn. at para. 8-085

JUDGMENT

Lord Mustill:

This appeal from a decision of the Court of Appeal of Hong Kong springs from a contract whereby Hoecheong Products Limited ("the sellers") agreed to sell to Cargill Hong Kong Limited ("the buyers") 10,000 tons of cotton seed expellers. The sellers did not deliver the whole contract quantity. The buyers claimed damages. The sellers relied on a "force majeure" clause in the contract to exempt them from liability. The ground asserted was that the contract called for shipment of goods originating in Henan province, and that there had been such a severe drought in Henan during the growing season that it was impossible for them to procure goods from the only permitted suppliers, the China National Native Produce and Animal By-Products Import and Export Corporation ("CNNP"). The buyers denied that the force majeure clause applied to the facts of the case, or that the formalities which it prescribed had been complied with. There were numerous other points of contention between the parties. Although the sum in dispute was, by the standards of modern commercial litigation, comparatively modest, every issue was tenaciously fought. At the trial before Deputy Judge Sharwood the sellers won on sufficient of the points to obtain a judgment in their favour. On appeal many of the Judge's conclusions were upheld, but the buyers prevailed on two central issues, and judgment was given in their favour for US$108,000 with interest and costs. The sellers now appeal to their Lordships' Board.

It is convenient to begin with the two crucial documents. The first is the force majeure clause. This was admitted on the pleadings to be a term of the contract.

> 12. Force Majeure: Should seller fail to deliver the contracted goods or effect the shipment in time by reason of war, flood, fire, storm, heavy snow or any other causes beyond their control, the time of shipment might be duly extended, or alternatively a part/whole of the contract might be cancelled, but the seller has to furnish the buyer with a certificate issued by China Council for the Promotion of International Trade (CCPIT) or an independent and competent Chinese Authority attesting such event or events.

Secondly there is the certificate which the trial Judge found, although the buyers denied, had been tendered by the sellers at the appropriate time:

> Hoecheong Enterprises Pte. Ltd.
>
> It's certificated that Henan province has got heavy losses and reduction of cotton, grain and etc., as an exceptionally serious in history and force majeure drought in 1986 in Henan province of PROC.

China Council for the promotion of International Trade, Henan Sub-Council.

The papers before the Board include what is plainly a version in the Chinese language of the same certificate. No attention has been paid to this document during the litigation.

As found by the trial Judge the facts were as follows. The sale contract, which was dated 27 September 1986, required shipment between 15 December 1986 and January 1987 at sellers' option, the price being US$84.50 per MT FOB trimmed one safe PRC port. Clause 8 of the contract stipulated:

Certificates:

A) Certificate of origin

B) Certificate of weight issued by CCIC/CCIB in China as final

C) Certificate of quality issued by CCIC/CCIB in China as final.

The buyers and their associates re-sold the goods under a series of contracts and sub-contracts which were important at the trial in relation to damages but are not material here.

In the event, the sellers were able to deliver only 1,000 MT of expellers under the contract. Negotiations ensued which led to the sale of 5000 MT expellers in substitution, at cost price, which was higher than the price fixed by the original contract.

Returning to the trial, after hearing evidence the Judge made findings as follows. In favour of the buyers he held that they were entitled to sue on the contract, although acting as agents for their Singapore principals; that the arrangement for the shipment of substitute goods did not amount to a waiver or compromise of their claim for short delivery; and that if they had a good cause of action they could recover substantial damages equivalent to the difference between the contract and the market price on the undelivered quantity. In favour of the sellers the Judge found that there was an oral collateral contract that the goods would originate in Henan; that in consequence of drought the quantity available for supply from Henan was much reduced; and that there was no legitimate source of supply of Henan expellers except CNNP. Consequently, the failure to deliver the full amount of goods was due to a cause beyond the sellers' control. As regards the CCPIT certificate, the Judge found that it was a genuine document, and that contrary to the buyers' assertion it had been delivered to them in late December 1986. As a matter of law the Judge held that it was no ground for objection that the certificate did not state that the events to which it attested had prevented the sellers from making complete delivery.

On appeal the judgment was upheld on many of these issues. Thus, the Court of Appeal declined to interfere with the findings in favour of the sellers that - (a) it was an express term of the contract that the goods would originate in Henan; (b) the certificate was genuine; (c) the certificate was supplied in December 1986; and (d) damages in respect of delay were not recoverable. Conversely the Court held in favour of the buyers that - (a) the buyers were entitled to sue and recover damages in their own name; (b) the agreement for the supply of substitute goods did not amount to a waiver of the buyers' claim; and (c) the measure of damage was the difference between the contract and the market price. The Court of Appeal did however differ from the trial Judge on the meaning of the force majeure clause and on whether the certificate complied with it. Holding that the certificate was insufficient the Court allowed the appeal and gave judgment in favour of the buyers for US$108,000.

Thus far, there is nothing exceptional about the case. There is, however, another and much less conventional feature; namely, that the Court of Appeal also decided in favour of the buyers on a ground of its own devising, which had not been pleaded, investigated at the trial or even argued before the Court of Appeal itself. The gist is contained on the following passage from the judgment of Penlington JA:

> The question of whether a seller can rely on a force majeure clause if, before entering into the contract, he was aware of facts which would reasonably be expected to bring that clause into operation are set out in *Benjamin's Sale of Goods*, 4th Edn. at para. 8-085 and the cases of *Trade and Transport Inc. v. Iino Kaiun Kaisha Ltd* [1983] 1 WLR 210 and the later decision of *Channel Island Ferries Ltd v. Sealink United Kingdom Ltd* [1988] 1 Lloyd's Report 323 are discussed. The learned author is of the view that a person cannot rely on a force majeure clause which, as a result of facts known to him at the time of contracting, inevitably bring it into operation. Here, while it was denied that the defendant knew the CSE was being purchased by the defendant (sic) for re-sale, the evidence was such that Mr. Wu must have known that and it would in my view be totally wrong for a seller to enter into a contract in such circumstances knowing that there was a grave risk to the purchaser that he would not receive the goods due to force majeure and, as here, not insert a similar clause in his contract of re-sale.

This reasoning has three elements. First, the force majeure clause did not bind the parties until November 1986, when the formal document containing it was signed. Second, at that time the sellers knew but the buyers did not know of a grave risk that the buyers would not received the goods due to force majeure. Third, in such circumstances the clause was not in law effective to excuse the under-delivery. The first two elements related to facts which had at most been touched upon in evidence. There had been no close investigation at the trial of the moment when the clause gained contractual effect, since the form of the buyers' own statement of claim led all concerned to proceed on the basis that the contract was made on 27 September 1986, and the possibility that the clause might have been introduced at a latter date was not in contemplation. Equally, evidence and cross-examination had not been directed to the sellers' state of knowledge at that time, or their subjective appreciation (if that is what the law requires) of the possibility that a force majeure event would impede shipment. Nor was the foreseeability of the delay examined from the buyers' point of view, which would be material both to the presumed intention of the parties in agreeing the clause and to the unfairness of allowing the sellers to rely upon it. All these questions passed without enquiry, since none of them were material to any pleaded issue.

Furthermore, if the third element in the chain of reasoning had been exposed to argument it may be - their Lordships cannot say - that the law would have been differently stated. The proposition extracted from *Benjamin on Sale of Goods* does not in fact represent the concluded view of the editors, but merely their opinion that it is arguable. The cases on this question (and there are others beside those cited in the judgment) are not straightforward, and it is at least possible that closer scrutiny would have led Court to a reading which allowed the sellers the benefit of the clause, even on the assumed facts. In the event the sellers had no opportunity to test the proposition which defeated their defence.

The sellers now contend that this procedure was impermissible, and that the decision of the Court of Appeal on the new question cannot be allowed to stand. Their Lordships must agree. The principles which inhibit the parties from raising new points on appeal, particularly where the facts have not been investigated at the trial, are so well-established that it is unnecessary to quote from authorities such as *The Tasmania* [1890] 15 App. Cas. 223, *Connecticut Fire Insurance Company v. Kavanagh* [1892] AC 473; and *Esso Petroleum Co.*

Ltd. v. Southport Corporation [1956] AC 218. These principles apply equally where it is the Court, rather than the parties, which seeks to introduce the new legal issue. If in the present case the matter had been ventilated in open Court it would, their Lordships believe, soon have become apparent that there had been insufficient exploration of the facts at the trial to permit the application of whatever law might have emerged from an examination of the authorities. In the event however even this modest examination did not take place. The point appears to have been an afterthought. It does of course happen from time to time that a Court comes to learn of a statute or authority bearing importantly on an issue canvassed in argument but through an oversight not then brought forward. The Court may wish to take the new matter into account. Before doing so it should always ensure that the parties have an opportunity to deal with it, either by restoring the appeal for further oral argument, or at least by drawing attention to the materials which have come to light and inviting written submissions upon them. The present case required even more meticulous procedures, for what the Court introduced was not new material on the existing issue but an entirely new question of law and fact. The occasions when an appellate Court would find it proper even to contemplate such a course after the conclusion of the arguments must be rare, but if it were ever to do so the first step must always be to have the matter thoroughly explored by adversarial means, as regards not simply the merits of the new question but also the propriety of entering upon it at all. If this had happened here, the sellers should have had little difficulty in showing that the case had proceeded too far to enable the question to be taken into account. The judgment would then have proceeded on the basis of the issues which had been in existence throughout, although the Court could, if it had wished, have kept the point open for consideration in some future case by emphasising that it had not been argued and did not form part of the decision. In the event however none of this happened. The course taken deprived the sellers not only of the opportunity to argue the point on the merits (which in itself would have required the Board to set aside this part of the judgment) but also of an unanswerable objection on procedural grounds. With the best of intentions the Court of Appeal acted in a way which was unfair to the sellers. The new issue should not have formed a ground for the decision under appeal, and their Lordships propose to say nothing more about it.

There remains the first grounds of decision, to which no such exception can be taken.

It is convenient to start by considering first what the sellers would have had to establish, to avoid liability, if the clause had ended with the words "a part/whole of the contract might be cancelled ...". There was little if any conflict about this. The sellers would be required to show first, that there had been an event of the kind stipulated by the clause operating at the relevant time; second, that this event had adversely affected the supply of the goods by the sellers; and third, that the sellers could not overcome this adverse effect by obtaining from a source other than the one which they had planned goods which matched the requirements of the contract. Authority for these propositions, if any is required, can be found in *P.J. Van der Zijden Wildhandel v. Tucker & Cross Ltd.* [1975] 2 Lloyd's Rep. 240, a decision on a virtually identical clause. As the result of findings in the Courts below against which there is no appeal it is no longer disputed that all three requirements were satisfied by the evidence in the present case. The dispute turns on the concluding words of the clause:

> ... but the seller has to furnish the buyer with a Certificate issued by China Council for the Promotion of International Trade (CCPIT) or an independent and competent Chinese Authority attesting such event or events.

Here again there is a measure of agreement between the parties. The certificate was to be neither a conclusive nor an exclusive method of proving force majeure. The sellers could not bring themselves within the clause simply by producing a certificate. They had a two-fold task: to prove that they had failed to ship by reason of a stipulated event, and also to produce a certificate in the appropriate form. This is however as far as the common ground extended. The parties, and the Courts below, differed as to what the certificate should contain. There were three views:

1. The document must certify that all three of the requirements identified above were satisfied.

2. The document must certify that the first two requirements were satisfied (viz., the occurrence of a force majeure event and interference with shipment) but need not deal with the impossibility of purchasing alternative goods.

3. The document need certify only the occurrence of a Force Majeure event.

The first construction was adopted by the Court of Appeal. If it is correct the certificate did not comply with the clause, and although in fact this was a case of prevention by force majeure the sellers cannot rely on the clause since the provision of an appropriate certificate was a condition precedent to its operation. On this view the appeal will fail.

The second construction may, their Lordships believe, have been the one preferred by the trial Judge. It also appears that on this view he regarded it as implicit in the certificate actually issued by CCPIT that it attested not only the occurrence of a force majeure event but also its impact on the sellers' ability to ship. He did not consider it necessary for the certificate to say anything about the sellers' ability to acquire alternative goods. If this construction of the clause and the certificate if correct the appeal must succeed.

The third construction is contended for by the sellers, and may (on the alternative reading of his judgment) have been adopted by the trial Judge. If it is correct the certificate undoubtedly complied with the clause and once again the appeal must succeed.

The choice between these rival constructions raises no question of principle, and no reported case can be expected to help. The clause does not express in clear language its intended result. If it had been a conclusive and exclusive evidence provision, as cl. 8 appears to be in its use of the words "as final", it would be easy to assume that the contents of the certificate were meant to comprise all the elements which would have to be established to create a defence under the first part of the clause. It is however clear that this is not so. The requirement for a certificate is additional to, not a substitute for, proof that facts exist which bring the exception into play. The question therefore arises: given that the sellers have in any event to prove by evidence that the whole of the requirements of the exception are satisfied, how much of the same ground has to be covered again by the certificate? As regards the existence of the force majeure event an attestation by CCPIT would be both useful and practicable. It would be useful because, in the event of non-shipment, when suspicions might well arise about the *bona fides* of the sellers' asserted excuse, it would furnish an independent and fairly rapid (*albeit* non-binding) demonstration that the sellers were not relying on an invented excuse for disregarding their obligations; and it would be practicable, because CCPIT would be well placed to know, or if necessary to find out, just what the conditions were at the relevant time in the place of origin. The same cannot be said of any requirement that the document should certify the other two elements necessary to bring the exception into play. To require the investigation of what might be quite complex facts, simply to attest a state of affairs peculiar to the one individual transaction, which would

have to be looked all over again at the stage of litigation or arbitration would be pointless. Moreover, even if CCPIT would be willing to certify not only the effect of the force majeure event on the individual position of the sellers, but also their inability to buy-in elsewhere, the organisation could not achieve this simply by using its own sources of information, and would have to conduct some kind of semi-judicial investigation, based on information supplied by the sellers and untested by the buyers. This would be both cumbersome and vulnerable to error.

In these circumstances their Lordships consider that from a practical point of view the third of the interpretations listed above is much to be preferred, and that since the wording of the clause does not point unequivocally the other way, the clause should be understood as requiring only that CCPIT should attest the occurrence of the force majeure event. On this view the certificate actually tendered was in compliance with the clause, and all the other requirements of the exception being fulfilled the sellers are not liable for the short delivery. Accordingly their Lordships will humbly advise Her Majesty that the appeal should be allowed, and the judgment of the trial Judge restored. The buyers must pay to the sellers their costs of the appeal to the Board and in the Courts below.